

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
NO. 16-1320 (L)
No. 16-1369

CAPITAL MEDICAL CENTER,)	
)	
Petitioner)	
)	PETITIONER’S
v.)	MOTION TO RECALL
)	AND STAY MANDATE
)	
NATIONAL LABOR RELATIONS)	
BOARD,)	
Respondent)	
)	
)	
UNITED FOOD AND COMMERCIAL)	
WORKERS LOCAL 21,)	
)	
Intervenor)	

Capital Medical Center, Petitioner herein, hereby moves, pursuant to Rule 41(d)(2) of the Federal Rules of Appellate Procedure and this Court’s inherent powers, that this Court recall its mandate, which issued on October 3, 2018, and that reissuance of the mandate be stayed pending the Supreme Court’s disposition of the petition for writ of certiorari timely filed by Petitioner on November 6, and placed on the Court’s docket on November 9, 2018. In support of this motion, Petitioner makes the following showing:

1. On September 16, 2016, Capital Medical Center filed its petition for review in this Court seeking review of a final order issued by the National Labor Relations Board (“Board”) on August 12, 2016.
2. On August 10, 2018, this Court issued its Opinion denying the petition for review and granting the Board’s cross-application for enforcement.
3. Thereafter, in accordance with its standard practices, the Board’s Regional Office sought compliance with this Court’s order. On October 3, 2018, Petitioner advised the Board’s Regional Office that it intended to file a petition for certiorari on or about November 8, 2018. That same day (October 3, 2018), the Board’s Regional Office responded that it would “make a note of this.” There was no indication that the Board would seek to initiate contempt proceedings while Supreme Court review was being sought.
4. Petitioner filed its petition for certiorari on November 6, 2018. This petition was docketed by the Court on November 9, 2018, as No. 18-608.
5. The petition presents the following primary Question:

Whether the National Labor Relations Board (Board), as affirmed by the D.C. Circuit, correctly determined that *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) and *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978)) (approving the Board’s presumption that employees of an acute-care hospital have a right under Section 7 of the National Labor Relations Act to orally solicit coworkers during nonworking time, other than in immediate patient care areas, and to communicate through distribution of written literature in non-patient care/non-work areas, during nonworking time), rather than *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) and *Hudgens v. NLRB*, 424 U.S. 507 (1976) (Section 7 and private property rights

must be balanced across a spectrum that depends on the nature and strength of the respective rights in any given context), establish the governing framework when employees seek to engage in informational picketing immediately in front of the main entrances to the employer's acute care hospital.

6. By letter dated November 30, 2018, the Board's Regional Director notified Petitioner that it had understood Petitioner's October 3, 2018 notification as a request that the Regional Director "defer compliance proceedings until the U.S. Supreme Court rules on [Petitioner's] petition for certiorari." Although by all appearances the Regional Director had acquiesced for almost two months in Petitioner's request to defer compliance proceedings, the Director stated that unless there was immediate compliance with the Board's order, as enforced by this Court, he would recommend that the Board institute contempt proceedings against Petitioner.
7. On December 4, 2018, the Solicitor General requested that the Court extend the due date for the government's response to the petition for certiorari from December 10, 2018, to January 9, 2019.
8. On December 6, 2018, the Court granted the Solicitor General's request.
9. In light of the Board's pending threat to initiate contempt proceedings, Petitioner requests that this Court recall its mandate and stay any reissuance of the mandate pending the Supreme Court's disposition of the already-filed petition for writ of certiorari.

10. Rule 41(d)(2) of the Federal Rules of Appellate Procedure authorizes a court of appeals to stay its mandate pending the filing of a petition for writ of certiorari, provided that the petition presents a substantial question and good cause exists. And a court has inherent authority to recall its mandate upon a showing of good cause. *Dilley v. Alexander*, 627 F.2d 407, 410-411 (D.C. Cir. 1980).
11. The petition for certiorari clearly presents a substantial question regarding the appropriate governing legal standard when employees of an acute-care hospital seek to picket immediately in front of the hospital's front entrances.
12. Good cause exists, as no meaningful harm will occur while the Court considers the petition. As noted, the Solicitor General's response is due on January 9, 2019, following which the petition will be ripe for disposition by the Court. Further, the primary affirmative relief provided by the Board's order is that Petitioner post a Notice to Employees for 60 days informing them of their statutory rights. A short delay in the posting of this notice will cause no obvious harm. There is no contention by the Board that Petitioner is continuing to engage in conduct contrary to this Court's cease and desist order.

WHEREFORE, Capital Medical Center respectfully requests that this Court recall its mandate and that it stay reissuance of the mandate until such time as the Supreme Court issues a final ruling.

Respectfully submitted this 17th day of December 2018.

/s/ Charles P. Roberts III

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because this motion contains 840 words.
2. This motion complies with the typeface requirements of Fed. R. App. P. 27(d)(1)(e) because this motion contains 887 words.

Dated December 17, 2018

/s/ Charles P. Roberts III

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 17th day of December, 2018, I caused this Petitioner's Motion to Recall and Stay Mandate to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of filing to the following registered CM/ECF users:

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